

12 TRANSCRIPT OF PROCEEDINGS
13 DECEMBER 9, 2016
BEFORE THE HONORABLE CLAIRE V. EAGAN, JUDGE PRESIDING

EXCERPT OF JURY TRIAL
THE TESTIMONY OF MICHAEL JAMES BERRYMAN

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Greg Bloxom, RMR, CRR
United States Court Reporter
Northern District of Oklahoma

Global One v SiteMaster (12-09-2016 Jury Trial - Volume V)

3

1 MORNING SESSION

2 DECEMBER 9, 2016

3 -----
4 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, OUT OF
5 THE PRESENCE AND HEARING OF THE JURY:)

6 **THE COURT:** Okay. We're on the record in open court,
7 outside the presence of the jury. Counsel and the parties are
8 present, and counsel would like to have a conference. Yes?

9 **MR. SHANK:** Your Honor, we just wanted to inform you,
10 based on the way the evidence has transpired, we don't see the
11 need to call Mr. Rogers on our witness list. That will leave
12 -- and we think -- counsel and I believe we'll get through
13 Mr. Berryman and Mr. O'Brien today. That will leave Mr. Tavel
14 as our witness. He has travel constraints. He'll be here
15 Sunday evening.

16 **THE COURT:** All right.

17 **MR. SHANK:** Our last witness will be --

18 **THE COURT:** Monday.

19 **MR. SHANK:** -- first thing Monday morning.

20 **THE COURT:** All right. And at some point today I'll
21 give you the jury instructions. I'll tell you they're not
22 dissimilar from the ones you submitted. We used OUJI. So I'll
23 give you those and we can decide whether we want to have the
24 instruction conference this afternoon so you'll know exactly
25 what the instructions will be or whether you want to wait and

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1 have it Monday morning. Okay?

2 **MR. SHANK:** That will be fine, Your Honor.

3 **THE COURT:** I don't think it's going to take you long
4 to get through the instructions.

5 **MR. SHANK:** Excellent. Thank you, Your Honor.

6 **THE COURT:** All right. Thank you.

7 **THE COURT SECURITY OFFICER:** They're all here.

8 **THE COURT:** Okay.

9 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, WITHIN
10 THE PRESENCE AND HEARING OF THE JURY:)

11 **THE COURT:** Next witness for plaintiff, please?

12 **MR. McCANN:** Mr. Mike Berryman.

13 (WITNESS SWORN)

14 **THE COURT:** Would you please state your name, and
15 spell your last name.

16 **THE WITNESS:** My name is Michael James Berryman.

17 That's B-E-R-R-Y-M-A-N.

18 **THE COURT:** Mr. McCann.

19 **MR. McCANN:** Thank you, Your Honor.

20 **MICHAEL JAMES BERRYMAN,**

21 being first duly sworn to testify the truth, the whole truth,
22 and nothing but the truth, testified as follows:

23 **DIRECT EXAMINATION**

24 BY MR. McCANN:

25 Q. Mr. Berryman, can you tell us, please, what is your

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1 profession or occupation?

2 A. Yes. I am the president of Berryman Enterprises,
3 Incorporated, which is a general contractor firm that's based
4 in Oklahoma City, and I have been in that capacity for 38
5 years.

6 Q. And, Mr. Berryman, describe generally the work of Berryman
7 Enterprises.

8 A. Well, it's been involved in all sorts of construction
9 projects over the life of the company. It's built banks,
10 churches, schools, retail, restaurants, apartment complexes,
11 municipal buildings. It has been licensed in 22 states as a
12 general contractor. It's currently licensed in six states as a
13 general contractor.

14 Q. And, Mr. Berryman, have you, on occasion, in your 38-year
15 history, provided services as an expert witness in litigation
16 matters?

17 A. Yes. For about 18 years I have functioned as a litigation
18 expert on construction issues about the nature and causes of
19 damages, the sequencing of work, contract issues, the
20 relationship between general contractor and subcontractors, the
21 role of those parties, the role of engineers, architects, etc.,
22 in our industry.

23 Q. And in that connection, have you provided, for those 18
24 years or so, expert testimony in both state and federal courts
25 throughout that period of time?

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1 A. Yes.

2 Q. As recently as yesterday in Oklahoma City; correct?

3 A. Actually, a couple of days ago.

4 Q. Okay. With respect to the period of time that you've been
5 providing services as an expert witness, have you ever been
6 denied the opportunity to testify as an expert?

7 A. No.

8 Q. And in terms of a percentage of your business, can you tell
9 us how much time you spend in the expert services area.

10 A. I spend about three-fourths of my time working as an expert
11 witness on litigation matters, and about 25 percent of my time
12 operating the construction company.

13 Q. And in your construction company business, you have other
14 personnel who work for you; correct?

15 A. Yes.

16 Q. Sir, were you retained by Global One Engineering, the
17 plaintiff in this case, to review and analyze issues in this
18 particular case involving a contract with SiteMaster to be
19 performed in or near Niscemi, Italy?

20 A. Yes.

21 Q. And in connection with your work in order to form an expert
22 opinion with respect to a variety of matters, can you tell us,
23 not every single point, but generally speaking, what documents
24 you were provided and referred to to arrive at your opinion.

25 A. Well, I reviewed about 1,000 pages of documents concerning

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1 the subcontract for the work to be performed, the award letter,
2 the terms and conditions of the contract, the purchase order
3 form, as well as numerous e-mails that transpired during the
4 course of construction. I've looked at reports that were filed
5 contemporaneously on a day-by-day basis by SiteMaster, and also
6 by a company called CorroMetrics. And I've read the expert
7 report that was written by SiteMaster's expert in this matter.

8 Q. And after your review of that documentation, some of which
9 we may see during the course of your testimony here today, did
10 you issue various opinions with respect to matters concerning
11 the Niscemi tower project?

12 A. Yes.

13 Q. With respect to the opinions which you issued, you, of
14 course, prepare a report with respect to that; correct?

15 A. Yes, a written report.

16 Q. And do you know that those reports, over the 18 years that
17 you've been acting as an expert witness, are routinely provided
18 to the opposing parties, as well?

19 A. Yes.

20 Q. Now, with respect to your opinion that you rendered in this
21 matter, were you able to determine, based upon your review of
22 all of the thousand or more pages provided to you, make any
23 determination with respect to the work activities of Global One
24 at the Niscemi site in Italy?

25 A. Yes.

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1 Q. And what, sir, was that opinion with respect to their work
2 and staffing and manning of the site in Niscemi?

3 A. Well, from my read of the documents, it appeared that they
4 diligently pursued the work on an everyday basis, they properly
5 manned the job, and that for delays that were outside of their
6 control, which I would be happy to document for you, those
7 delays took away from the 99 contract days that they had
8 available and made it impossible to complete the job according
9 to the deadline.

10 Q. Now, let me ask first about the 99 days that you refer to.
11 Do you recall what that period was and where you ascertained
12 that that was the period of performance?

13 A. Well, it's in the contract documents, and it extends from
14 June 8th until September 15th of 2015.

15 Q. And the 99 days encompasses that entire period of time,
16 seven days a week for however many weeks; correct?

17 A. Yes.

18 Q. As a result of reviewing the materials that were provided
19 to you, did you determine whether or not there were delays in
20 the performance of the contract that impacted the number of
21 days which Global One had to perform its work?

22 A. Yes, I did.

23 Q. And can you advise us what you were able to determine with
24 respect to that?

25 A. Well, at a minimum, there were 46 days, 46 of the 99 days

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1 for which it could be documented the time was lost. So,
2 basically, about 45 percent of the time was lost for delays
3 that were outside Global One's control.

4 Q. And when you say delays that were outside Global One's
5 control, is that a point that's of significance to you based on
6 your experience in the construction industry?

7 A. Yes, because typically in construction contracts time is an
8 important element, and so if you're given 99 calendar days --
9 and it needs to be looked at in terms of calendar days -- if
10 you're given 99 days to complete a job and you need those 99
11 days, then if you lose some of those days for things that are
12 outside of your control, then you need to have those days
13 restored in order to be able to perform your work, because work
14 takes a certain amount of time, and if you take enough days
15 away, it becomes impossible to complete it in a timely fashion.

16 Q. And is that what you determined in this case, that it
17 became impossible to complete it in a timely fashion because of
18 the 46 days of delay?

19 A. Yes. It became impossible because of the number of people;
20 there were six to eight people onsite. And so when you look at
21 the days that were available, it would have been impossible for
22 six to eight people to complete the work in the number of days
23 that were available after the delays had occurred.

24 Q. Okay. Let's talk about some of the individual delays, if
25 we can. Of the 46 days that are at issue in this particular

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1 opinion which you have rendered, are some of them delays which
2 are exclusively, in your view, related to delays caused by the
3 Navy?

4 A. Yes.

5 Q. And actually, Mr. Berryman, we'll be projecting these on
6 the screen that's in front of you. It will save you having to
7 hopefully --

8 A. All right.

9 Q. -- juggle with your large binder there.

10 What was the first delay that you recall in connection with
11 this contract that was caused by the Navy?

12 A. Well, the start date was supposed to be June 8, 2015, and
13 14 days were lost right off the bat because Global One was not
14 allowed to mobilize and come to the project to get started
15 until June 22nd. So, that's 14 of the 99 days, again roughly
16 14 percent of the time was lost before they ever arrived on the
17 job.

18 Q. And, sir, let me show you what has previously been
19 marked as -- if you look up in the upper right-hand corner
20 there, you can see an invoice number, and for our shorthand
21 purposes that we've been using in this case, you see at the end
22 of the number is a -4?

23 A. Yes.

24 Q. So, from here on out, as I refer to some invoices, I'll
25 just be using that last number, because the other numbers

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1 remain the same. All right?

2 A. Yes.

3 Q. Now, this particular invoice -- this is sensitive this
4 morning -- this particular invoice is the invoice that you're
5 talking about for the 14 days of delay; is that correct?

6 A. Yes.

7 Q. And you perhaps saw up at the top, as we were looking at
8 the invoice number, it appears that it has been paid by
9 SiteMaster. Do you recall that?

10 A. Yes, that's right.

11 Q. And in this particular case, the total of the invoice for
12 the 14 days of delay is approximately just short of \$66,000;
13 correct?

14 A. Yes.

15 Q. Now, in your mind, sir, do you place any significance upon
16 the fact that SiteMaster actually paid this invoice?

17 A. Yes, because, in and of itself, that's evidence that, one,
18 it did occur and that it was legitimate. And speaking from the
19 perspective of a general contractor, you're certainly not going
20 to pay an additional almost \$66,000 for something that you
21 dispute or believe did not occur or wasn't legitimate.

22 Q. And, sir, you said an additional amount of money to be paid
23 as a result of these delays. Can you explain the concept of
24 delay payments in terms of what they bear in relation to the
25 overall contract.

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1 A. Yes. In this matter, just in rough numbers, the starting
2 point was about a million dollars, and in the construction
3 industry we call that the base bid. So the base bid in this
4 project was approximately a million dollars. And then in this
5 project, as is somewhat typical, there are things added along
6 the way to the base bid. Sometimes those are things like 10
7 more doors in a project. Sometimes they are extra costs for
8 delays, because when you have a delay you still have personnel
9 that are being paid, you still have hotel rooms in this case
10 that are being rented, and so forth. So, delays oftentimes
11 cause situations that have to be reimbursed, and so that
12 reimbursement is over and above the base bid. So, that can
13 cause the million dollars in this case, over time, to climb,
14 and in this case eventually became somewhere around \$1.2
15 million. So, it's a million dollars for the base bid of the
16 work to be performed, and 200,000 more for the delays and other
17 things that happened along the way.

18 Q. Now, with respect to the either delays or changes in the
19 means and method of performance of work that come up during the
20 course of the contract, is that the, in this case, the
21 approximately \$200,000 additional amount that was added to the
22 base amount of the contract?

23 A. That's right.

24 Q. But in terms of performance on the contract, those
25 particular delays -- excuse me -- those particular payments are

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1 not related to actual performance on the contract, are they?
2 A. That's right. I mean, for instance, this invoice that we
3 just looked at for \$66,000, that doesn't come off the million.
4 That is an extra that's paid on top of the \$1-million. So
5 there's an important distinction there, that as these things
6 are added for delays, for extra work, changes in means and
7 methods, what have you, those are in addition to and are paid
8 separately from, through various different invoices, from the
9 \$1-million. It is not to be applied to the \$1-million.

10 Q. Let me show you another invoice, sir. This one is the -5
11 invoice, and does this appear to be another invoice for a Navy
12 delay?

13 A. Yes.

14 Q. And do you recall, from your review of the documents, the
15 basis for this particular delay?

16 A. Yes. Beginning on June 27th, so 27, 28, 29 and 30, Global
17 One was delayed because the general contractor, SiteMaster, was
18 waiting on an approval from the Navy that is known in our
19 industry as an NTP, Notice To Proceed, and that is to get
20 approval from the Navy that the work plan, the rigging, what
21 was planned is safe and acceptable to the Navy, and you can't
22 go forward until you have that approval in hand. Instead of
23 having that in hand at the time that Global One was ready to
24 get on the tower and get to work, there was a four-day waiting
25 period for the Navy to be forthcoming with that, and so the

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1 invoice that you see here on the screen now is for those extra
2 four days.

3 Q. And just like the earlier invoice that we saw, are these
4 charges again in the nature of those that get added to the base
5 contract?

6 A. Yes. Again, this is additional above the \$1-million, does
7 not come off the base bid. It's not a credit against the
8 million dollars.

9 Q. The next invoice appears to be the invoice that is -6. Do
10 you see that?

11 A. Yes.

12 Q. Also paid; correct?

13 A. Yes.

14 Q. And does this appear to be a Navy requirement associated
15 delay?

16 A. Yes.

17 Q. And what was the purpose of this one, if you know?

18 A. Well, as I understand it, this is a one-day delay where in
19 the transit, meaning moving from your place of lodging coming
20 onto the job site, that there was a delay apparently because of
21 some sort of protest activity or potential protest activity
22 that knocked Global One out of working for this one day.

23 Q. And, in fact, in reviewing both the CorroMetrics and the
24 SiteMaster daily work reports, there was no work report for
25 that day; correct?

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1 A. That's right.

2 Q. Next I'll show you is the invoice that is marked -9. Do
3 you see that?

4 A. Yes.

5 Q. Also paid?

6 A. That's right.

7 Q. And you see what this particular delay concerns?

8 A. Yes.

9 Q. And based upon your review of the records in the case, what
10 were you able to determine about this delay?

11 A. Well, that on the island of Sicily where the tower is
12 located apparently there's a contingent of people in the
13 country that don't like it being there and they wanted to
14 protest, and so there were four days in early August where a
15 protest took place and it was apparently unsafe or ill-advised
16 for work to go on, so again, four days were lost by Global One,
17 not of their doing but for circumstances that were outside
18 their control.

19 Q. So, with respect to the four invoices we've just reviewed,
20 those were all Navy-caused delays; correct?

21 A. Yes.

22 Q. And like these last two, like the first two, the same
23 information applies, it's an add-on to the base amount of the
24 contract but separate from the work milestones?

25 A. Yes.

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1 Q. To summarize then, we have one delay for 14 days --

2 A. Yes.

3 Q. -- and then almost immediately thereafter the four-day
4 delay for the notice to proceed. So, 14 and 4 are 18; correct?

5 A. Yes.

6 Q. And then we had the one day in July for the possibility of
7 a protest, so that makes it 19; correct?

8 A. Yes.

9 Q. And then the last four that we just talked about, add to
10 19, is 23 days directly attributable to a Navy decision not to
11 permit work during those periods of time; correct?

12 A. Yes, that's right.

13 Q. In addition to -- so that's, of the 46 days you mentioned,
14 that's half the days; correct?

15 A. Yes.

16 Q. And did you also make a review and look at other delays
17 which were involved in the particular case?

18 A. Yes.

19 Q. And can you describe generally the sort of categories, if
20 you will, into which those delays took place, and then we'll
21 discuss them individually.

22 A. Okay. I mean, they result primarily from things that would
23 be called changes in the scope of work. The scope of work
24 being defined as what you're supposed to do. So, the work
25 changed for what are known as the means and methods, which in

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1 the construction business means how are you going to do the
2 work, what's your method, what's your means of performing it,
3 because when you bid a project, especially in this case, you
4 put forth, "This is how we intend to do the work," and then if
5 a change occurs as to how that work is going to be performed,
6 sometimes it causes a change in the cost because your costs go
7 up or the time goes up, and some more time can be required as a
8 result of the change, so that the rest of the delays have to do
9 with changes in the scope, what was to be done, and how it was
10 to be done.

11 Q. With respect to these delays, did you review, among the
12 records that were provided to you, communications concerning
13 these delays about what happened?

14 A. Yes.

15 Q. And do you recall, as a result of that review, that there
16 were some discussions between the parties in the middle part of
17 July that addressed, among other things, some of these delays?

18 A. Yes.

19 Q. I'm going to show you in previously admitted joint trial
20 exhibit 20, at page 2, which is the start of an e-mail chain,
21 in this case an e-mail chain from Samantha Schaffer on Sunday,
22 August 16th, addressed to Mr. Bigger, the CFO of SiteMaster,
23 talking about a variety of issues. Do you recall reviewing
24 that?

25 A. Yes. And for some reason that's not on my screen.

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1 **THE COURT:** Is the screen not on?

2 **THE WITNESS:** No. I mean, it has been, but it's off
3 now.

4 **THE COURT:** Yeah, it's the wire. The plug.

5 **MR. McCANN:** The particularly sensitive wire at the
6 bottom there. You're not the first.

7 Q. (BY MR. McCANN) And after the first part of that, which
8 deals largely with costs of some spray guns and things like
9 that that we'll talk about in a moment, it continues on on page
10 4 to discuss a variety of issues. Do you see that, sir?

11 A. Yes.

12 Q. Now, the very first paragraph is the two-week delay.

13 You've already talked about that so we don't need to do that.

14 Take a moment to review the second paragraph and advise me
15 if that was one of the delays which you considered in arriving
16 at the additional 23 days that comprise the 46 after the Navy
17 delays.

18 A. Yes. Number 2 was also considered, and that's when Global
19 One got started, the previous subcontractor that had been on
20 the job, which was Northern Pride, was supposed to have left
21 rigging in place that would have made scaling the tower faster
22 and easier. That rigging had been taken down, so Global One
23 had to put it back up. That's something that they didn't
24 anticipate. It took a couple of days. Incidentally, they were
25 not paid more for doing that extra work, and it did take extra

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1 time.

2 Q. And I'm going to show you now one of the contractor reports
3 that you recall having seen. Do you recall that?

4 A. Yes. What's the date on that?

5 Q. Oh, I'm sorry. This particular one is June 22nd, their
6 first day. You can see it up at the top right there.

7 A. Yes.

8 Q. It's the first day on the project. Do you see that?

9 A. Yes.

10 Q. And do you see a reference here a little more than halfway
11 down the page that starts on the left, "Northern Pride did not
12 leave the ropes they agreed to leave on site for Global
13 One." Do you see that?

14 A. Yes.

15 Q. And as a result of that, did that require, in your view,
16 additional effort that delayed the effective start because with
17 an 827-foot tower you've got to have the right ropes and
18 rigging to do it?

19 A. Yes. It not only affects your time line but it also
20 affects your cost, because as a person that bids on the project
21 you anticipate a certain work that you have to do for a certain
22 price, and when you show up and you've got to do more than you
23 anticipated because someone else failed to do something that
24 they were supposed to do, it, of course, puts more work on you
25 and more cost on you to overcome that.

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1 Q. Okay. Paragraph 3 deals with the Navy delay, correct, on
2 getting the notice to proceed?

3 A. Yes.

4 Q. And why don't you review, if you would, please, paragraph 4
5 and tell us what determinations you made with respect to that
6 matter.

7 A. Well, there are 24 anchors at the base of the tower that
8 needed to be prepped and painted also and it was discovered
9 after the work started that the degree of corrosion that was on
10 the anchors themselves required much more intensive work in
11 order to make them in an acceptable manner, and so additional
12 money was agreed to and paid by SiteMaster for the additional
13 work on these anchors. It did take additional time also, and
14 so this is a note pointing out that it took at least two extra
15 days. And in my review of the documents, I would believe that
16 it took more than two days, but we see here two days were
17 claimed.

18 Q. But for purposes of your opinion, you accepted the two
19 days?

20 A. Yes.

21 Q. And, in fact, the change that is referred to there and the
22 fact that there was an increase in the contract, that was
23 actually a milestone change that was added to the base amount
24 of the contract; do you recall that?

25 A. Yes. Originally, the contract was a million dollars, but

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1 as a result of this particular item on the anchors, the
2 contract was increased to a \$1,011,615.

3 Q. So that the addition of \$11,615 was specifically to the
4 anchors?

5 A. Yes.

6 Q. Because of a change in the scope of work?

7 A. Yes, and that was agreed to by SiteMaster.

8 Q. And agreed to as acknowledged by their change in the
9 purchase order terms in the milestones there; correct?

10 A. Yes.

11 Q. With respect to the information contained in paragraph 5,
12 explain to me, if you would, how that played into your
13 determination of additional delay days.

14 A. Well, during the project there were numerous discussions
15 about what it was going to take to actually get the tower
16 prepped in the manner that SiteMaster felt was necessary and so
17 there was a change in the means, methods, and to the degree
18 that scraping would occur to provide a proper surface. And so
19 this number 5 talks about that going into the project one day
20 was allotted to do every 100 lineal feet of tower, meaning from
21 top to bottom it would be able to scrape it in nine days, but
22 instead, changes required it to be done more extensively, that
23 changed the time by nine days, and as you can see there, three
24 additional days were lost up front. So, when you add all that
25 together, this spells a 12-day delay.

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1 Q. And in this connection, among the changes being considered
2 was an approval by SiteMaster to use power tools with wire
3 wheels in order to clear the loose and flaking paint on the
4 tower. Do you recall that?

5 A. Yes.

6 Q. And the use of power tools and wire brushes that just
7 attach to the power tool were not a means and methods of
8 performance specified in the award letter, were they?

9 A. That's right. Originally, what would be important when you
10 bid a project like this is to have an understanding of how you
11 want the work done. In other words, the tower could have been
12 scraped all the -- or could have been sandblasted all way down
13 to raw metal if that's what somebody wanted to do but it would
14 have been a lot more expensive.

15 So, as Global One considers, "What can we do this job for,"
16 to the degree that the Navy wants it done or to the degree that
17 SiteMaster wants it done is an important consideration. Going
18 in, it was supposed to just be hand-scraped. Well, if you
19 elevate that now to using power tools, of course that's going
20 to be more time consuming, and you've got to think about how to
21 get power to the tools, you've got to either have extension
22 cords that run from a generator or you've got to have battery
23 operated devices, and so it becomes more intensive, more time-
24 consuming, and more expensive.

25 Q. With respect to the sixth paragraph, were you aware, first

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1 of all, that the award letter in this particular case
2 contemplated the use of mitt painting for both the priming and
3 painting of the Niscemi tower?

4 A. Yes.

5 Q. And did you become aware that there was a point in time
6 when the decision was made apparently to switch that method and
7 means of performance?

8 A. Yes.

9 Q. In what respect, sir?

10 A. Well, originally, it's was contemplated to be mitt painted.
11 It was switched to spray to get a more aesthetically pleasing
12 look on the tower. And so that change and how to do the work,
13 spray versus mitt, is something that came pretty much in the
14 mid point of the project.

15 Q. And in terms of that change to spray painting which you
16 described to have a -- to improve the look or the aesthetics of
17 the tower, did you see any indication in the scope of work that
18 the appearance or aesthetics with respect to the tower was a
19 contractual requirement?

20 A. No, it's not a contractual requirement. Instead, what you
21 see in the documents when you look at them as a whole, that the
22 reason for painting the tower in the first place was to make
23 sure that it would be visible by planes so that they wouldn't
24 hit it, and for corrosion control, not for aesthetics.

25 And so, mitt painting, which of course is not going to look

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1 as finished as a spray --

2 **MR. SHANK:** Can we approach, Your Honor?

3 **THE COURT:** Yes.

4 (THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH, OUT OF
5 THE HEARING OF THE JURY:)

6 **MR. SHANK:** This is very well documented.

7 **MR. McCANN:** I'll stop it.

8 **MR. SHANK:** He has nowhere to go with this.

9 Absolutely nowhere.

10 **MR. McCANN:** I'll stop.

11 **THE COURT:** You can talk to him. Go ahead.

12 **MR. McCANN:** May I talk to him?

13 **THE COURT:** Yes.

14 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, WITHIN
15 THE PRESENCE AND HEARING OF THE JURY:)

16 Q. (BY MR. McCANN) In connection with the information that
17 relates to item 6 about the change from mitt painting to spray
18 painting, what opinion did you draw simply with respect to the
19 delay days that were occasioned by that change and why those
20 days are, in your view, appropriate to consider as delay days?

21 A. Well, because it took time to figure that out and get it
22 moving. In other words, just like it says here, a couple of
23 days to try out -- there was a spray gun that was onsite,
24 because you've got to -- you've first got to back up and
25 realize that Global One didn't come to this project prepared to

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1 spray; they came prepared to do mitt painting. So, to change
2 to spray, they had to work with the contract officer for the
3 Navy as to what spray gun would be acceptable, and then they
4 had to locate one that was local. The local gun didn't perform
5 very well because it was probably worn or defective in some
6 manner. And then they had to order guns and have them shipped
7 in to Italy as quickly as possible, and so there were delays in
8 switching from a means of mitt to spray that were -- that
9 couldn't be avoided; it is just something that happens when you
10 switch gears like that.

11 Q. And based upon the information in paragraph 6 upon which
12 you relied, and the decision to change from mitt to spray
13 painting, did you agree that a total of two days for attempting
14 to find different mitts, two days for fixing the spray gun that
15 was obtained locally that was a used one, and then another two
16 days to basically learn the spray painting system, were, in
17 your view, reasonable delay days?

18 A. Yes.

19 Q. And that also formed part of your opinion, did it not?

20 A. That's right.

21 Q. Going on to page 5 of exhibit 22, we see up at the top in
22 paragraph 7, that's the no transit court decision day on July
23 9; correct?

24 A. Yes.

25 Q. That you've already testified about.

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1 And then there's an indication of a loss of one day due to
2 an e-mail for a change in the desire of which bands were to be
3 completed. Do you see that?

4 A. Yes.

5 Q. And what do you understand that to be?

6 A. Well, late in the project, when SiteMaster realized that
7 the project couldn't be completed on time, there was discussion
8 about how to change the sequence of which bands would be
9 painted, and there was discussion back and forth over a one-day
10 period about how that sequence would be changed and what would
11 be the new marching orders going forward.

12 Q. Okay. Was that, in your view, a basis for a change -- or a
13 delay caused as a result of that decision?

14 A. Yes.

15 Q. And did that involve basically the rerigging of the shroud
16 to some other location?

17 A. Yes.

18 Q. Going back for a moment, just while it's still fresh in our
19 minds, this decision to change from mitt to spray painting, did
20 that also result in some additional charges in the nature of a
21 change?

22 A. Yes, it did.

23 Q. I'll show you what is marked as exhibit 11. It's indicated
24 as paid; correct?

25 A. Yes.

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1 Q. And here you see that the changes include charges for tower
2 spraying costs to switch to Graco systems, about \$57,000; paint
3 and materials to continue spraying, about \$15,000; and then
4 there's an additional employee mobilization, as well?

5 A. Yes.

6 Q. And like the other delay type payments that we have talked
7 about, is this a payment apparently paid by SiteMaster as a
8 result of the change that is an outside-the-milestones-of-
9 the-contract payment?

10 A. Yes. This would be recognized as a change to the base bid,
11 which was originally about a million dollars, and that change
12 to the base bid is over and above the one million. It's
13 essentially saying, "We've recognized that a change has been
14 made and we're going to compensate you for that," and that's
15 what this invoice is for.

16 Q. Now, to compensate them for that is just for the costs of
17 the goods and equipment, since those were not originally
18 contemplated or required by the scope of work; correct?

19 A. That's right. I mean, this does not make any sort of
20 allowance for "we will extend more calendar days to complete
21 the project," most likely because more calendar days were not
22 available.

23 Q. Okay. I believe those are all of the -- when you add up
24 the numbers that are reflected on the exhibit 20 where we were
25 going through the e-mail plus the invoices and so forth that

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1 add up to the 46 days; is that correct?

2 A. That's right.

3 Q. Now, in addition to that, none of the delays which you
4 considered in saying there was at least a 46-day period of
5 delay included any weather-related delays, did they?

6 A. No.

7 Q. But you do know that there were weather-related problems
8 with proceeding to work, as well, don't you?

9 A. Yes.

10 Q. Okay. With respect to your opinion that you believe that
11 there are 23 days of delays caused by the Navy for which Global
12 One was not responsible, do you also believe that with respect
13 to the other 23 days that you've identified and we've just
14 talked about, that those were either as a result of changes in
15 the means and methods of performance or changes in the scope of
16 work that were not the fault of Global One?

17 A. Yes, that's accurate.

18 Q. So, if you accept the proposition that there are 46 days
19 total, as your opinion does, of delays that are not caused by
20 or the responsibility of Global One, what effect does that have
21 on the 99 days period of performance in the contract?

22 A. Well, it basically takes away about half the time that was
23 allotted to do the work and, in my opinion, makes it impossible
24 to complete it on time.

25 Q. Now, you know -- or you knew in this case, did you not,

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1 that there was a -- you know, the Navy had wanted to get this
2 site up and running again; correct?

3 A. Yes.

4 Q. And so that the September 15, 2015, for the portion of work
5 being done by Global One was a hard, immovable deadline from
6 the Navy's perspective; do you agree?

7 A. Yes, because there was a contractor to follow from
8 September 15 to September 30, and it's my understanding that on
9 September 30 or October 1st that this tower needed to be up and
10 transmitting for military purposes.

11 Q. And what is the custom and practice in the industry, if you
12 have a 99-day period of performance, what is the custom and
13 practice in the construction industry if you had to use this
14 specific hypothetical 46 days of delay on a 99-day period of
15 performance?

16 A. Well, you'd simply have to add those days onto the back
17 side. So, for instance, up front, if you had a 14-day delay
18 right out of the box, then you would have to add that onto the
19 contract time and it would extend the contract time from
20 September 15 to September 29th for that first delay, and so
21 forth for the second delay and the third delay and the fourth
22 delay, those days would simply be added onto the back. So,
23 money would be tendered for the delay and time would be allowed
24 on the back side of the contract.

25 Q. The fact that money is tendered for any of these delays

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1 really is only to compensate for, in effect, idle time;
2 correct?

3 A. Well, it's to compensate for additional costs that arise
4 because of the delay or the change. So if you delay 14 days on
5 the front side, you have people hired, they're there, they're
6 in hotel rooms, Global One's costs go on regardless of the
7 delay, so to the extent that those costs go on, they have to be
8 reimbursed and that's why these reimbursements occur. But what
9 hasn't happened here is no additional time was put on the tail
10 end of the contract.

11 Q. Now, did you review, during the course of these discussions
12 in mid August between SiteMaster and Global One, did you review
13 some of those communications back and forth?

14 A. Yes.

15 Q. Was there ever any communication back and forth that would
16 permit the add-on of the days on the back side, to use your
17 words, that were lost as a result of delay or changes in the
18 means and method of performance?

19 A. No.

20 Q. Okay. So that the true finite period of time then that
21 would have been available, assuming every single day was used
22 to complete this contract given those delays, is really 53
23 days; correct?

24 A. That's right.

25 Q. Do you recall in the discussions which took place in the --

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1 or your review of the e-mails and discussions which took place
2 from August 14th to about August -- or 13th maybe to about
3 August 17th when these matters were, at least for those days,
4 laid to rest, do you recall that there were various approvals
5 by SiteMaster with respect to some of these changes in means
6 and method of performance and the way the contract was to be
7 performed?

8 A. Yes, there was some back and forth about these issues,
9 there are e-mails in there where SiteMaster agreed to these
10 things, and then later we see that payments were made as a
11 result of those agreements.

12 Q. As a result of your review of that sort of series of
13 communications by mail and e-mail over that middle period of
14 August, were you able to determine whether or not in your view
15 from the communications there was an expectation by the parties
16 that they were going to still be able to complete the contract
17 in full by September 15th?

18 A. No. In fact, you see that it's obvious that both parties
19 knew that it wasn't going to be possible to complete on time,
20 so there was a lot of discussion about, "Okay, how much work
21 can we get done and how can we work together in order to
22 maximize performance," all the time realizing that it wasn't
23 going to be completed.

24 Q. Do you recall in the e-mail that we were looking at a
25 moment ago that is joint exhibit 20, in addition to the areas

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1 which we discussed, which starts with the e-mail from
2 Ms. Schaffer, the discussion -- I think you can get all the
3 words there -- the discussion in this top paragraph concerning
4 both demobilization and closeout payment issues?

5 A. Yes.

6 Q. And as you understood it, what were the issues being
7 addressed in that regard?

8 A. Well, in the schedule of values, which perhaps you've
9 already seen, it lays out, it breaks the \$1-million down into
10 various components, and part of the breakout is that at the end
11 of the job there is a sum paid to demobilize, which is just
12 like it sounds, to pack up and get ready to ship to go home,
13 and then also a lump sum for closeout. Neither one of those,
14 demobilization or closeout, are connected to performance or
15 production on the project. So there was some discussion about
16 whether those values would change at all because Global One
17 wasn't going to have enough time to complete the project. If
18 we read this and follow through with some e-mails over the next
19 couple of days following this, we see that there were no
20 changes to the purchase order for the values associated with
21 demobilization and closeout.

22 Q. In that regard, there was an e-mail the next day, was there
23 not?

24 A. Yes.

25 Q. Which addressed certain payments for paint and other

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1 invoices that were specifically addressed and are referred to
2 in some of these bullet points here. Do you see that?

3 A. Yes.

4 Q. And I'll just tell you, that's on August 16th at 4:01 p.m.,
5 so just after -- let me be sure about that before I say that --
6 yes, about four hours after Samantha Schaffer's e-mail at
7 12:04. I'm sorry. That would actually be before except that I
8 don't know if it takes into account the time difference, but
9 the e-mail that is being shown here, does that appear to be in
10 response to the issues addressed -- some of the issues
11 addressed on price and dollars in Ms. Schaffer's e-mail?

12 A. Yes. I mean, this is on Sunday, and as you track through
13 this, the discussions on this began on Friday and extended into
14 the weekend where, if you trace this through, there was going
15 to be some discussion about this. Apparently there was. And
16 the conclusion, as I understand it, is shown at the bottom
17 where Mr. Bigger is saying that, with regard to the
18 demobilization and closeout cost, the schedule of values shall
19 remain as is, meaning according to what they were in the
20 original purchase order.

21 Q. Do you recall reviewing the award letter to see what the
22 contractual requirements were with respect to demobilization?

23 A. Yes.

24 Q. And generally speaking, was it as you described earlier?

25 A. Yes. I think what's important is that's what it's going to

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1 take to shut the project down and get home. It doesn't have
2 anything to do with how much painting was or was not
3 accomplished.

4 Q. And with respect to the award letter, that is, exhibit 6 in
5 this case, did you also attempt to find any description of what
6 was required of Global One for the closeout milestone?

7 A. No, there's no description for that.

8 Q. And is it correct, sir, then that the only -- and I'll show
9 you what is a purchase order, up at the top dated August 5th of
10 2015. Did you have an opportunity to review this purchase
11 order?

12 A. Yes.

13 Q. And, in fact, it represents -- there were two other prior
14 versions, but this is the last and the applicable version of
15 the milestones of the purchase order that are at issue in this
16 case, as you understand it; isn't that correct?

17 A. Yes, that's correct.

18 Q. And your opinions then were based upon the purchase order
19 milestones, or statement of values as they're sometimes
20 referred to, that are referred to here; is that correct?

21 A. That's right.

22 Q. And looking at milestone number 4, which relates to
23 anchors, can you see that that is where the \$11,615 was
24 actually added to the change in the milestone payments?

25 A. Yes.

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1 Q. Not an issue outside of the contract like the delays or
2 other changes, but here directly acknowledged by SiteMaster by
3 change in the milestone; correct?

4 A. Yes.

5 Q. And you also see that with respect to tower prep, tower
6 prime and tower paint, there are what I'll call incremental
7 amounts based on a per-foot charge; isn't that correct?

8 A. Yes.

9 Q. And did you understand from your review of the
10 documentation that from and after this purchase order time, it
11 would have been an understanding that for so many feet as are
12 completed, there is an entitlement to painted -- excuse me --
13 to be paid?

14 A. Yes, that's right. The line items there, 5, 6 and 7, are
15 directly connected to production based on how many feet have
16 been completed of each of those three items.

17 Q. And not exclusively related to completion of all 827 feet
18 for the three categories?

19 A. Yes.

20 Q. And, in fact, do you recall again during those discussions
21 or e-mails back and forth in the mid point of August there
22 being specific discussions and references by SiteMaster that
23 there would be payment for as much painting as could be
24 completed by September 15th, even if not the entirety of the
25 contract?

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1 A. Yes.

2 Q. And in that respect, is that written statement basically an
3 acknowledgment of what's found here in the purchase order
4 milestones?

5 A. Yes.

6 Q. Now, is there any question in your mind with respect to
7 some of these changes in means and methods of performance that
8 to the extent that they are recognized in the writings that
9 took place during the middle of August period, that those are,
10 in fact, changes to the contract?

11 A. Yes, they are.

12 Q. There's not a specified magic form by which changes are to
13 be made and approved, is there?

14 A. No, there's not.

15 Q. But so long as SiteMaster acknowledges in writing a change,
16 in your experience, is that, in the custom and practice in the
17 construction industry, a change to the agreement?

18 A. Yes, it is, and especially when you couple that with
19 tendering a payment. I mean, that's evidence to me that there
20 was an agreement.

21 Q. Now, with respect -- we know in this case that there, of
22 course, were performance items performed under the milestones
23 that are part of this purchase order that is exhibit number 8
24 for which payment was not made; correct?

25 A. Yes.

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1 Q. Nevertheless, is it your opinion, based on your review of
2 the records and your understanding in the industry, that for
3 work actually performed for these three milestones -- well, and
4 indeed for the anchors which are on a per-anchor basis -- that
5 if the work is performed and an invoice submitted for that,
6 that that would be consistent with the purchase order even if
7 not the entire contract is completed?

8 A. Yes. And we see a pattern of that because from early on
9 there were billings on the base contract that tie back to these
10 values; as so many feet were performed, so many feet were
11 billed, that number of footage was paid, and so forth as we go
12 through the contract time line.

13 Q. So, not only would that be normal custom and practice in
14 the industry, but you have specific confirmation of it through
15 the invoicing and, at least early on, some payments?

16 A. Yes.

17 Q. Based upon your review of the documents, including invoices
18 and the purchase order and the contract documents and so forth,
19 did you conclude what the amount of unpaid -- well, let me ask
20 you. You talked a moment about demobilization and closeout a
21 moment ago. As a result of your review of the contract and the
22 award letter and the purchase order, did you make any
23 determination, based upon your understanding of the customs and
24 practices of the industry, whether it was appropriate that
25 those matters be invoiced and paid?

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1 A. Yes, I did.

2 Q. And your opinion is that they have been invoiced and should
3 be paid?

4 A. Yes, that's right.

5 Q. After your review of the unpaid invoices and all the other
6 issues which you have considered in connection with this case,
7 did you arrive at a calculation of what you believe to be the
8 monies which should be paid to Global One in this case?

9 A. Yes, I did.

10 Q. And what was that -- well, let's just describe the
11 methodology first. So, how did you make that determination
12 with respect to your damage calculations?

13 A. Well, I first took a look at the base bid, which at this
14 point in the project is \$1,011,615, and then asked myself,
15 based on all the other documents, what of those values would be
16 due, and so obviously due and already paid were milestone 1, 2
17 and 3. Milestone 4 was completed and billed. Portions of
18 milestone 5, 6 and 7 were billed. And then Global One did come
19 back to the United States, and so I determined that they did
20 demobilize, they did closeout, so that would be due. And then
21 I looked at all the documents to see what of those additional
22 amounts of the million dollars had been agreed to and decided
23 and picked out that these were obviously agreed to in terms of,
24 for instance, the cost to go from mitt painting to spray
25 painting, and the other delays that were agreed to that

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1 occurred and simply added all those up to come to a final
2 number of this is what they earned by virtue of the contract
3 and then subtracted what they had been paid, and so that
4 rendered a balance due.

5 Q. And do you recall what that balance due was?

6 A. It's around \$367,000. I'd have to look in my report.

7 **MR. McCANN:** Your Honor, may the witness refresh his
8 recollection in that regard?

9 **THE COURT:** Yes.

10 A. My calculations were \$367,987.

11 Q. (BY MR. McCANN) With respect to the invoices that were
12 unpaid and about which you've testified is your opinion that
13 consistent with the custom and practice in the industry and the
14 contract documents they should be paid, do you recall the
15 amount of the unpaid invoices?

16 A. I'm referring to my report now where I did the
17 calculations. The total unpaid invoices, including the base
18 bid on the million plus the changes that I thought were
19 appropriate, that was 242,923.87. That is not in addition to
20 the 367; that's included inside the 367.

21 Q. And the number which you have used there involves, if I
22 may, to again refresh your recollection, if you'll look to
23 section 1.3.1 of your opinion, and I'll have some questions for
24 you about it.

25 A. Yes.

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1 Q. And those were the -- you've referred there specifically
2 to, as you look in that whole section, the change invoices, and
3 in both means and methods of performance and delay day
4 invoices, have you not?

5 A. Yes.

6 Q. And those total the \$242,000 or so that you indicated;
7 correct?

8 A. That's right.

9 Q. Okay. Now, we know that some of those invoices were
10 actually paid, weren't they?

11 A. Yes. In fact, all of those -- all those invoices except
12 for one had been approved and some of those had been paid.

13 Q. Okay. And with respect to all of those change invoices,
14 except the one, that was about a \$5,000 one; correct?

15 A. Yes.

16 Q. What was the totals of all of those unpaid or paid change
17 invoices?

18 A. 202,436.56.

19 Q. How then did you get from the 202,000 to a \$242,000 number?

20 A. Well, I took the \$202,000 and put on a 20 percent overhead
21 and profit because these items, since they are over and above
22 the contract, it is standard in the industry for a contractor
23 to mark up those costs because that's how a contractor makes
24 money, is to put labor, material and other expenses into first
25 the subtotal and then mark that up, and that's how a profit is

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1 made.

2 So, in my opinion, based on industry standard and common
3 practice, that you would take these expenses, which total
4 202,000 and some change, and add on what would be, in my
5 opinion, a reasonable industry profit considering the stature
6 and location of this particular project.

7 Q. In addition to the opinions which you have rendered so far,
8 did you also have an opportunity to review what were claimed as
9 damages by SiteMaster?

10 A. Yes.

11 Q. And in general, without reference to their specifics, which
12 we may discuss later, what documents did you review in order to
13 determine what those counterclaim damages were?

14 A. Well, there was, in my file materials, there was a
15 statement, basically a damage statement, a one- or two-page
16 document from SiteMaster where they outlined what they felt
17 like they were due.

18 Q. Okay.

19 **MR. McCANN:** Your Honor, may I inquire just to be sure
20 that exhibit 37 is admitted?

21 **THE COURT:** Joint?

22 **MR. McCANN:** Yes.

23 **THE COURT:** It is.

24 **MR. McCANN:** There we go.

25 Q. (BY MR. McCANN) Is this the document you were referring

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1 to, sir?

2 A. Yes.

3 Q. Now, this was provided to you -- by the way, your report is
4 dated in mid July; isn't that correct?

5 A. Yes.

6 Q. So this calculation of damages was reported or provided to
7 you sometime prior to the date of your report, July 18;
8 correct?

9 A. Yes, that's right.

10 Q. And by the way, that's July 18 of 2016; right?

11 A. Yes.

12 Q. You did this several months ago?

13 A. Yes, that's right.

14 Q. Now, at the time that this -- was this the only information
15 you had at the time you rendered your opinion with respect to
16 the matters that are addressed in this particular exhibit?

17 A. Yes, it is.

18 Q. And what did your review of this damages calculation
19 disclose and what did you determine with respect to it?

20 A. Well, at the time that I wrote my report, this was just a
21 projection of what the expected costs were. So, based on
22 number 1, there was -- I'm sorry -- yeah, based on the -- the
23 \$73,520 was for an inspector to remobilize and go back to the
24 site.

25 The next value, 80,644.56, they're claiming as an offset,

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1 but I think what's important about this is that that work that
2 that value describes had already been approved and paid
3 previously by SiteMaster. So the way I interpret this in their
4 statement of damages is that they want to take that money back.

5 **MR. SHANK:** May we approach, Your Honor?

6 **THE COURT:** Yes.

7 (THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH, OUT OF
8 THE HEARING OF THE JURY:)

9 **MR. SHANK:** That's not our claim of damages. He's
10 saying that's our statement of damages. We're not claiming
11 that \$80,000. He wasn't here for the testimony, even though he
12 could have been and all of that, so he's talking about
13 projections.

14 **THE COURT:** All right. So, is there a different
15 document that they can use rather than this one?

16 **MR. SHANK:** The testimony from Mr Chalker and
17 Mr. Bigger --

18 **THE COURT REPORTER:** Pardon me. You need to speak up,
19 please.

20 **THE COURT:** Mr. McCann, will you be able to question
21 the witness using the testimony that Mr. Bigger and Mr. Chalker
22 gave?

23 **MR. McCANN:** I think I should be able to do that. But
24 I think it's also important, there's another one after this
25 which was provided in discovery that's also admitted.

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1 **THE COURT:** But the pretrial order trumps everything
2 else. They said in the pretrial order they're seeking 900,000.
3 That was in the statement of the case I gave the jury. So,
4 whatever comprises the 900- that they're claiming now is what
5 you should be questioning on; otherwise, we're going down
6 rabbit trails based on what they're asking for.

7 **MR. McCANN:** Okay.

8 **THE COURT:** Do you have a statement of what --

9 **MR. McCANN:** I wrote --

10 **THE COURT:** You wrote it down.

11 **MR. McCANN:** -- it down. I think it's actually
12 953,000 or something.

13 **MR. SHANK:** I'll double check. I think it's 956-,
14 something like that.

15 **THE COURT:** So if you can get your notes of that.

16 **MR. McCANN:** Yes.

17 **THE COURT:** Thank you.

18 **MR. SHANK:** Thank you.

19 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, WITHIN
20 THE PRESENCE AND HEARING OF THE JURY:)

21 Q. (BY MR. McCANN) You were aware before we started your
22 testimony here that, of course, there's been testimony in this
23 trial from Mr. Chalker about what the current claim for damages
24 is; do you understand that?

25 A. Yes.

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1 Q. Let me advise you, and you may want to make a note of some
2 of these numbers if you've got any questions, that Mr. Chalker
3 testified that the costs of the Allstate contract, which is the
4 successor contractor, were \$653,000. He also testified that
5 there was an additional \$300,000 --

6 **THE COURT:** 305-.

7 **MR. McCANN:** I'm sorry?

8 **THE COURT:** 305,000.

9 **MR. McCANN:** Oh, okay.

10 Q. (BY MR. McCANN) Well, after he itemized it, he indicated,
11 I believe, \$7,000 for additional engineering costs; \$54,000 for
12 additional CorroMetrics inspector costs; \$48,000 for logistics
13 costs; \$80,000 for SiteMaster direct labor for three persons,
14 for the three persons who went to the Niscemi site; and
15 \$116,000 of SiteMaster overhead. And I'll tell you that my
16 notes reflect that, other than those numbers, he did not
17 otherwise identify anything about it except the source of the
18 payment. Okay? For a total of, I have, as 958-.

19 Sir, with respect -- let's begin first with the overarching
20 question, and although the monetary amount has changed slightly
21 from the time that you did your report, based upon your review
22 or now understanding of those amounts of the claim, do you have
23 any opinion as to whether or not those amounts that are
24 reflected there should be the responsibility of Global One?

25 A. They should not. They are not the responsibility of Global

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1 One.

2 Q. And why?

3 A. Because, again, had Global One had the time that was
4 allotted under their contract, which was 99 calendar days, if
5 they had had that time available to them, they could have
6 completed the project as they originally planned; there would
7 be no need to send someone back to complete the project. So,
8 it's not their responsibility that the delays occurred, and
9 it's not their responsibility that it's going to cost this
10 amount of money to finish the job.

11 Q. Sir, did you review records that were provided to you that
12 caused you to conclude the percentage of the work that was
13 completed by Global One of Global One's contract?

14 A. Yes.

15 Q. And what did you determine in that regard, and explain how
16 you came to that conclusion.

17 A. Well, I did three different things to try to determine what
18 was the extent of completion at the time they had to leave the
19 project, and there's three sources there. One is when we look
20 at the job site reports that were recorded contemporaneously by
21 SiteMaster, their project manager, that shows that the project
22 was -- that Global One's work was 55 percent complete on
23 September 15th.

24 Another reference is there is a construction schedule that
25 was put out by SiteMaster's project manager that shows, again

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1 contemporaneously during the project, that Global One's work
2 was 57 percent complete at the time they left.

3 And then a third method of looking at it is when you look
4 at Allstate's proposal, that being the contractor that actually
5 went back to finish the job, if you look at their bid proposal,
6 how it's explained, what they're going to do, and what's
7 already complete, I mean, by default, it says these are the
8 things that need to be done to complete it, and so you come
9 back into that and say, well, if these -- I'll make up a
10 number -- if there's 10 things and six things need to be
11 completed, then you can infer that four of them must be done.
12 And when you go through and analyze those four from a dollar
13 value of what they're worth, looking at the original schedule
14 of values again, what was set out very early on, what are the
15 values of that work, and you take what was completed and
16 apparently didn't need to be addressed at all and divide that
17 by the total amount of money in the contract, it brings you to
18 about the same point of completion.

19 And so there's three methods that show that they were
20 somewhere between 54 to 57 percent complete on September 15th.

21 Q. Let me just show just for a moment the joint exhibit
22 35. Is this the Allstate proposal that you were referring to
23 with the different amounts that they were required to do?

24 A. Yes, it is.

25 Q. And when you said there was a -- I don't remember if you

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1 called it a construction schedule or something else that you
2 determined was a 57 percent amount?

3 A. Yes, a construction schedule.

4 **MR. McCANN:** Your Honor, may I approach for a moment?

5 **THE COURT:** Approach me?

6 **MR. McCANN:** Yes.

7 **THE COURT:** Sure.

8 (THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH, OUT OF
9 THE HEARING OF THE JURY:)

10 **MR. McCANN:** The critical path --

11 **THE COURT:** Right.

12 **MR. McCANN:** -- which I think is what this is, and I'm
13 going to be talking about that, that was provided to us I think
14 on -- I don't know -- it was sometime in September, after that,
15 but he was provided another copy and I think it's admitted and
16 I think he's entitled to --

17 **THE COURT:** I was waiting for him to say the words
18 "critical path."

19 **MR. SHANK:** I was waiting for hopefully the words
20 "mid-morning break," per chance?

21 **THE COURT:** Aren't we close?

22 **MR. McCANN:** We're pretty -- I don't know. I mean,
23 every day is a new day. Maybe 20 minutes.

24 **THE COURT:** Okay. So, yeah, let him look at it on the
25 break.

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1 **MR. McCANN:** Okay. Thank you.

2 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, WITHIN
3 THE PRESENCE AND HEARING OF THE JURY:)

4 **THE COURT:** Ladies and gentlemen, we're going to take
5 our mid-morning recess for 15 minutes. Please do not discuss
6 the case on the recess. Thank you.

7 (A RECESS WAS HAD, AFTER WHICH THE FOLLOWING PROCEEDINGS
8 WERE HAD IN OPEN COURT, WITHIN THE PRESENCE AND HEARING OF THE
9 JURY:)

10 **THE COURT:** Mr. McCann.

11 **MR. McCANN:** Thank you, Your Honor.

12 Q. (BY MR. McCANN) Mr. Berryman, just before the break, you
13 were talking about a construction schedule that you reviewed.
14 Do you recall that?

15 A. Yes.

16 Q. And you indicated that -- well, first of all, is this the
17 construction schedule which you reviewed?

18 A. Yes, it is.

19 Q. And are you familiar with the term "critical path"?

20 A. Yes.

21 Q. Some witnesses have referred to this document in that
22 respect. Is that a term acceptable to you, as well?

23 A. Yes.

24 Q. And I believe you indicated to us that your recollection,
25 without seeing the exhibit, was that you had reviewed it and

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1 that there was 57 percent completion of the painting phase. Do
2 you see that?

3 A. Yes.

4 Q. And, in fact, do you see that actually the 57 percent
5 refers just to the completion of the lead renovation and
6 surface preparation line? Do you see that?

7 A. Yes.

8 Q. And can you review from here, based on the total tower
9 painting phase, what the percentage of completion is indicated?

10 A. Yes. It's in the bolded print where it says "Tower
11 Painting Phase" and out to the far right it says "59 percent."
12 That is basically an averaging of all the lines below. You see
13 several are at 100 percent, one is at 57 percent, two are at 35
14 percent. So the aggregate job that Global One would have been
15 responsible for is at 59 percent. That's the top number in the
16 upper right-hand corner.

17 Q. And with respect to that number, did you also -- that's one
18 of the numbers that you used along with the 55 percent from the
19 construction report and the one other thing which -- oh,
20 comparing the Allstate proposal and so forth that you used to
21 determine that that appears to be an accurate number?

22 A. That's right.

23 Q. And with respect to the Allstate proposal, there you're
24 actually looking at number of feet remaining to be accomplished
25 and figuring out what happens with these numbers if that's all

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1 that's remaining; correct?

2 A. Yes. By taking, you know, a bid from a contractor that
3 says, "Well, here's what's left to be done," then a person
4 could, by inference, determine what has been done that's
5 acceptable and then do the math to figure out what's been
6 completed and what's left to complete.

7 Q. And all three of those numbers lead you to what conclusion,
8 based on your experience and background in the industry, of the
9 extent to which the tower painting phase was completed?

10 A. I would say from those three reference points that it was
11 about 55 to 59 percent complete.

12 Q. I want to show you, sir, what's previously been marked as
13 plaintiff's exhibit 96. Do you see that, sir?

14 A. Yes.

15 Q. And I want to go over with you the invoices in this case
16 which remain unpaid. Do you understand that the invoices in
17 this case that remain unpaid, as indicated in exhibit 22, are
18 the invoices numbered 12 through 16 inclusive?

19 A. Yes, that's right.

20 Q. And, sir, during the opportunity we had for a break here,
21 did you sum the total amount of the unpaid invoices?

22 A. Yes.

23 Q. And do you recall, sir, that that was a sum total of
24 \$329,511.21?

25 A. Yes, that's right.

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1 Q. And that would represent an amount which, if I understand
2 it correctly in your view, for the work performed and milestone
3 items completed, that Global One is entitled to recover because
4 they were not permitted the extra 46 days to complete the
5 contract?

6 A. That's right.

7 **MR. McCANN:** I have no more questions of the witness,
8 Your Honor.

9 **THE COURT:** Thank you.

10 Cross-examination?

11 **MR. SHANK:** Thank you, Your Honor.

12 **CROSS-EXAMINATION**

13 BY MR. SHANK:

14 Q. Mr. Berryman, you offered up a definition in your testimony
15 earlier this morning that I thought was pretty handy. You said
16 the scope of work is what you're supposed to do. Do you
17 remember that?

18 A. Yes.

19 Q. And you testified several times that over the course of
20 this project, based on all your experience in the construction
21 industry and your review of all these documents, the scope of
22 work changed several times. Do you remember that?

23 A. Yes.

24 Q. Will you define for me the scope of work in this project.

25 A. Well, generally speaking, it was to repaint the tower and

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1 the anchors.

2 Q. Did that change, in your estimation, at any point in time
3 during this project?

4 A. Well, as I said, that's a general way of stating it. I
5 think if you get out the contract documents and look at the
6 section that's called "Scope of Work," it outlines in greater
7 detail what that scope is and what the parties had contemplated
8 on how that scope was to be done, the means and the methods,
9 the sequencing.

10 Q. I want to stop you right there because you just walked into
11 that second handy definition you gave us earlier today. How
12 things are to be done are the means; correct?

13 A. Yes.

14 Q. Scope is "what" and not "how"; correct?

15 A. Well, generally speaking, yes. I mean, sometimes those
16 lines are blurred in the industry as to which is scope and
17 which is means. I mean, they're intertwined, they're not
18 always separate.

19 Q. But in your testimony earlier today, there were very clear
20 definitions for both; right?

21 A. Yes, I said two clear definitions, but I also maintain that
22 they're not completely separable.

23 Q. Do you remember taking your deposition in this matter with
24 me?

25 A. Yes.

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1 **MR. SHANK:** Your Honor, may I approach --

2 **THE COURT:** Yes.

3 **MR. SHANK:** -- my table?

4 Q. (BY MR. SHANK) A moment ago when I asked you to tell us
5 your understanding of the scope in this project in this
6 project, the "what" that was to be done, you made that simple
7 statement about repaint the tower and the anchors; you remember
8 that?

9 A. Yes.

10 Q. And then you said there were some other things that were
11 included in the scope; you remember that?

12 A. Yes.

13 **MR. SHANK:** Counsel, page 50.

14 Q. (BY MR. SHANK) Do you remember testifying in your
15 deposition:

16 "Q. What was the scope of work for the tower project
17 with regard to Global One?

18 "A. It's shown on page 1 of the SiteMaster award
19 letter dated April 1st, 2015.

20 "Q. Where?

21 "A. On page 1.

22 "Q. Okay. What's your understanding of the scope of
23 work requirement for Global One on the tower project?

24 "A. To completely repaint the tower. The tower
25 should be cleaned free of any loose or flaking paint using lead

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1 abatement procedures, an epoxy primer and urethane color
2 coating should then be applied, include painting of corroded
3 areas at all guy anchors.

4 "Q. So that's the scope of work for Global One on the
5 tower project; correct?

6 "A. Yes."

7 Do you remember giving that testimony?

8 A. Yes.

9 Q. When you gave that testimony, you were under the same oath
10 that you are today; correct?

11 A. Yes, but you offered --

12 Q. You've answered my question.

13 A. -- you offered a very specific --

14 **THE COURT:** Sir, sir, you've answered his question.

15 Your lawyer can ask you a question later.

16 Q. (BY MR. SHANK) And it's still your testimony in front of
17 this jury today that the "what" that Global One was required to
18 do in Italy changed several times; correct?

19 A. Yes.

20 Q. Remember when you testified earlier this morning and you
21 said that the contract contemplated six to eight crew members
22 on the project for Global One?

23 A. Yes.

24 Q. And you said, based on that requirement, it would be
25 impossible for them to finish the project based on the delay

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1 days. Do you remember that?

2 A. Yes.

3 Q. The contract didn't really require them to have a number of
4 crew members, did it?

5 A. I don't know that you can say that it's a requirement. I
6 mean, it's definitely mentioned in the contract documents.

7 **MR. SHANK:** Pardon me, Your Honor.

8 Q. (BY MR. SHANK) Let's look again at your testimony under
9 oath at deposition on page 14, line 1.

10 "Q. Okay. So you've said that they provided the
11 number of people that they said with the proposal and required
12 by the contract; correct?

13 "A. Well, the number of people wasn't required by the
14 contract. All that was required by the contract was to
15 complete the work in 99 days."

16 Do you remember testifying to that effect?

17 A. Yes.

18 Q. In discussing your opinion based on whether delays were
19 appropriate in this matter for Global One, you mentioned the
20 alteration of the sequencing work on the tower; do you remember
21 that?

22 A. Yes.

23 Q. And that's a change in the means and the methods; correct?

24 A. It's not so much the means and methods but the sequencing
25 of what was contemplated by the parties.

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1 **MR. SHANK:** Counsel, on page 68.

2 Q. (BY MR. SHANK) Back to your deposition under oath, line
3 11.

4 "Q. And altering from this sequencing in your opinion
5 is a change of the scope of the work; correct?

6 "A. Well, it's -- I would say it's more a change to
7 the means and the methods or the procedures which affect
8 performance and efficiency."

9 Do you remember testifying to that effect?

10 A. Yes. Sequencing means --

11 Q. You've answered my question. Thank you.

12 Do you remember testifying here earlier this morning that
13 the invoice you analyzed concerning payment for the switch from
14 mitt spray -- mitt painting to spray painting was not
15 contemplated in the scope of work? Do you remember that?

16 A. Yes.

17 Q. So that was not a change in the scope of work; correct?

18 A. It is not a change in terms of generally speaking that
19 you're supposed to paint the tower and the anchors. It did
20 change what was contemplated by the parties, as is expressed in
21 the contract.

22 Q. My question was simply: The change from mitts to spray
23 guns is not a change in the scope of work; correct?

24 A. No, I don't think that's correct. And I can explain if
25 you'd like for me to.

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1 Q. Even though you testified earlier today that there's no
2 reference to mitt or spray painting in the scope of work; do
3 you remember that?

4 A. No.

5 Q. Mr. Berryman, in your 38 years of experience in the
6 construction industry, have you ever seen instances where a
7 general contractor reclaims portions of a previous payment to a
8 subcontractor at the end of a contract based on that
9 subcontractor's failure to perform?

10 A. I probably have seen that in my career, I've seen someone
11 attempt to do that.

12 Q. Let's look back at your deposition under oath.

13 **MR. SHANK:** Counsel, page 119, starting at line 16.

14 "Q. Mr. Berryman, in your experience in the
15 construction industry, have you ever come across an occasion to
16 see where a general contractor may seek to reclaim portions of
17 pay applications based on a subcontractor's failure to perform
18 at the end of a contract?

19 "A. Yes, I probably have. I can't think of a
20 specific instance."

21 Line 5 on page 120:

22 "Q. Well, as the prime contractor, you've made
23 payments to a sub over the course of a project, you've come to
24 the end of the project and performance of that sub is an issue
25 and so any remaining payments withheld by the general would

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1 make a claim, kind of a claw-back of previous payments based on
2 that sub's poor performance?

3 "A. Well, I want to make sure I'm answering your
4 question because if you're saying, leaving change orders out of
5 this for just a minute, if you're saying that you've got a
6 contract, you've got a million-dollar contract and you've paid
7 \$800,000 in this scenario and you've come to the end of it and
8 you say to your subcontractor, 'Not only do I want -- not only
9 am I not going to pay you the last 200,000 I owe you but I'm
10 going to claim 100,000 of the 800- that I have paid to you for
11 some reason,' is that what you're asking?"

12 "Q. Yes.

13 "A. Yes, of course that happens from time to time."

14 Do you remember that testimony?

15 A. Yes.

16 Q. Mr. Berryman, I would like to draw your attention to
17 exhibit 8 so we can look at that final milestone one more time.

18 **MR. SHANK:** Ms. Lynn, are we -- thank you.

19 Q. (BY MR. SHANK) I would like you to pay particular
20 attention to the first three milestones. Based on all of your
21 construction experience, your analysis of the documents in this
22 case, would you please tell the jury how Global One would get
23 paid for milestone 3 under this milestone.

24 A. They would complete mobilization.

25 Q. Well, what about signing the contract?

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1 A. Well, you said milestone 3, didn't you?

2 Q. Yes, sir, I did.

3 A. Milestone 3 is mobilization, travel, \$100,000.

4 Q. Is it your testimony in front of this jury that they
5 wouldn't have to sign a contract before they got to milestone
6 3?

7 A. Well, the contract doesn't say anything about -- even
8 though these are set up as 1, 2, 3, 4, 5, it doesn't say
9 anything about they necessarily have to be done in that order.

10 Q. Oh, so you would expect SiteMaster to pay Global One for
11 flying to Italy without signing a contract; is that your
12 testimony?

13 A. Well, it's a hypothetical, it's not likely to happen, but
14 for whatever reason if the contract wasn't signed and they
15 traveled, it would be something that they would be due, it
16 would be something that they earned according to the schedule
17 of values.

18 Q. So, payment of milestone 3 does not require completion of
19 payments of milestone 1 or 2?

20 A. There's nothing in the contract documents that indicate
21 that, no.

22 Q. And nothing in your 38 years of experience would inform
23 that answer?

24 A. As I said, it's not likely they would do anything until the
25 contract is signed, but this is based on did you do the work,

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1 did you do what's described here, if you did then you get paid
2 for it.

3 Q. And you just pick whichever one you want to get paid and
4 you get paid?

5 A. No, but let's say that a couple of these are out of order,
6 prime versus paint, this is not set up to indicate you're
7 supposed to necessarily do it in this step because obviously
8 when you look at 5, 6 and 7, they were doing prep, paint and
9 prime sometimes all at the same time, and so this is just a
10 schedule, this is what you get to charge as you complete these
11 various items.

12 Q. Mr. Berryman, in your 38 years of experience in the
13 construction industry, have you ever worked on a project for
14 the Navy?

15 A. No.

16 Q. In your 38 years of experience in the construction
17 agency -- industry, have you ever worked internationally?

18 A. No.

19 Q. In your 38 years in the construction industry, have you
20 ever worked on a tower painting project?

21 A. No.

22 Q. In all of your experience testifying with regard to the
23 construction industry, have you ever testified in a case
24 concerning SSPC standards?

25 A. Not that I know of.

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1 Q. Notwithstanding all that, am I correct that in your opinion
2 you find none of the delays in this project were caused by
3 Global One?

4 A. That's correct, they were not.

5 Q. Thank you.

6 Am I correct that you find no fault with Global One
7 concerning the tower project?

8 A. That's correct.

9 **MR. SHANK:** Pass the witness, Your Honor.

10 **THE COURT:** Anything further?

11 **MR. McCANN:** No, Your Honor.

12 **THE COURT:** All right. Thank you.

13 May the witness be excused? May he leave the city?

14 **MR. McCANN:** May I confer with the witness for just a
15 moment?

16 **THE COURT:** Yes. Why don't you step down. Thank you.

17 * * *

18 **REPORTER'S CERTIFICATION**

19 I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
20 TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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